

IN THE MATTER OF LICENSE NO. 409318  
Issued to: John S. MILLAR

DECISION OF THE COMMANDANT  
UNITED STATES COAST GUARD

1943

John S. MILLAR  
Z-1086115

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 4 May 1971, Administrative Law Judge of the United States Coast Guard at San Francisco, California, suspended Appellant's license for three months on 12 months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as Chief Mate on board the SS TRANSHURON under authority of the license above described, on or about 10 November 1970, Appellant wrongfully pumped oily ballast from said into the navigable waters of the United States, to wit, the Corpus Christi Channel, thereby causing pollution of said waters.

At the hearing, Appellant was represented by professional counsel, though not of his choice. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence some water samples, three radio messages and the testimony of three witnesses.

In defense, Appellant offered in evidence the testimony of two witnesses.

The Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. He entered an order suspending Appellant's license for a period of three months on 12 months' probation.

The entire decision was served on 17 December 1971. Appeal was timely filed on 14 January 1972.

#### FINDINGS OF FACT

On 10 November 1970, Appellant was serving as Chief Mate on board the SS TRANSHURON and acting under authority of his license while the ship was in the port of Corpus Christi, Texas. Because

of the disposition to be made of this case, further findings of fact are unnecessary.

#### BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that Appellant was denied the right to counsel of his choice and the opportunity to prepare an adequate defense. Because of the disposition to be made of this contention, Appellant's further exceptions will not be detailed.

APPEARANCE: John R. Harold, Esq., New York, N.Y.

#### OPINION

The events which led to this case occurred on the morning of 10 November 1970 and the charges were served upon Appellant in the late afternoon of that same day. A hearing was subsequently convened at 1330 on the following day, which was Veteran's Day, a national holiday. At that time an attorney, one Michael Mahaffey, representing the owners of the vessel, appeared at the request of Appellant for the sole purpose of requesting a change of venue and a continuance to allow Appellant to retain counsel of his own choosing and time to prepare an adequate defense. Despite evidence to the effect that diligent efforts to locate counsel had been thwarted by the time frame and the holiday, this motion was denied, ostensibly to permit the testimony of the government witnesses without postponement of the vessel's sailing. At this point, Mr. Mahaffey stated that he would have to enter an appearance and move for a continuance for time to prepare a defense. He was particularly reluctant to cross-examine the government witnesses on such short notice. The Administrative Law Judge directed that the hearing proceed, stating that he would "give some thought to that when the point arises." Mr. Mahaffey then agreed to act as counsel of record for Appellant and the hearing proceeded to conclusion with no further objection evident on the record. However, the transcript is so incomplete as to preclude assurance on this point.

The right to counsel of one's own choosing is fundamental to the concept of due process, and there is no question that Appellant was denied this right. He was, in effect, given less than 24 hours, most of which comprised a national holiday, to retain counsel of his choice. This cannot be characterized as a reasonable length of time. The Administrative Law Judge left Appellant no choice but to accept representation by the shipowner's attorney. If it was so necessary to obtain the testimony of the Coast Guard witnesses, the hearing could have been continued after their direct examination. They could have later been recalled or

deposed after Appellant had retained counsel of his choice. This course of action was, however, not suggested; and Appellant should not be charged with the failure of the attorney, whom he did not choose, to make such a suggestion. In short, the necessity of obtaining testimony is no excuse for the denial of counsel of choice.

Appellant was further prejudiced in that he was denied reasonable time within which to prepare a defense. Mr. Mahaffey did not know that he would actually be representing Appellant until after the convening of the hearing, and yet the Administrative Law Judge denied his motion for a continuance. Commandant Appeal Decision No. 317 dealt with a situation in which a hearing was held on the day following the occurrence in question. Defense counsel's motion for continuance was denied because of the availability of the government witnesses. The subsequent suspension order was vacated because the person charge had not been afforded adequate time to consult with his attorney and prepare a defense. The instant case is no less compelling.

ORDER

The order of the Administrative Law Judge dated at San Francisco, California, on 4 May 1971, is VACATED. The Charge is DISMISSED.

C. R. BENDER  
Admiral, United States Coast Guard  
Commandant

Signed at Washington, D. C. this 13th day of June 1973.

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